

NORTHERN TERRITORY LICENSING COMMISSION

**REASONS FOR DECISION
(COMPLETE WITH SUBSEQUENT ORDERS)**

PREMISES: SCOTTY'S PLACE, Alice Springs
COMPLAINANT: Supt. G. Moseley, for NT Police
DATE OF HEARING: 16 & 17 Feb 2000
HEARD BEFORE: Mr John Withnall (Presiding)
 Ms Mary Ridsdale
 Ms Shirley McKerrow

This has been a hearing of a complaint by Superintendent Moseley (in his official capacity) of a breach of the Liquor Act by the licensee of Scotty's Place at about 9.55pm on Friday 23rd April 1999. On 18 February 2000 the Commission handed down written Reasons for Decision at the time of our findings. We were subsequently addressed by Counsel as to what consequences should follow those findings, and these Reasons now include *all* rulings and orders made in the proceedings.

At the commencement of proceedings Mr Preston for the licensee raised the threshold issue of whether the Commission had power to proceed with the hearing inasmuch as there had been no complaint within the meaning of the Liquor Act at the time the Registrar had purported to comply with Sec. 48(6)(a). Mr Preston maintained that folio 1 of Exhibit 1 *prima facie* was not a complaint. Our ruling on this preliminary issue was in the following terms:

The present hearing is a consequence of a formal determination by the Commission to hold a hearing into the complaint by Superintendent Moseley as to events at Scotty's Place on the evening of 23 April, 1999.

There is no doubt that a complaint existed at the time the Commission made its determination to hold the hearing, and had existed unarguably since 8 June,

1999 at the latest (see folio 24, Exhibit 1). Superintendent Moseley's letter of 8 June, 1999 confirms that the author intended his previous correspondence of 10 May, 1999 (at folio 1, Exhibit 1) to have been a complaint. The complainant endorses the Registrar as having properly accepted the previous correspondence of 10 May, 1999 as a complaint.

We believe that on the face of the earlier letter it was open to the Registrar to have accepted it as a complaint. No form is prescribed for a complaint; the statutory requirements are that it be in writing, be signed by the complainant and lodged with the Registrar. These requirements were complied with. Mr. Preston's point, however, is that the early letter did not actual *say* that it was a complaint under the Liquor Act.

In practice, the Registrar frequently accepts as complaints letters and items of correspondence which do not on the face of them refer to themselves as complaints. It must be a judgment call by the Registrar in each case as to an author's intent. In the present case the author's intent had been clarified by the author well before the Commission determined to hold a hearing.

The only issue that we can therefore see is whether the licensee was prejudiced or suffered any procedural unfairness by this process of ratification of the complainant's original intent, and this distils down to only the possible technicality that the Registrar may have been compelled to duplicate the sequence of statutory correspondence pursuant to section 48(6) *after* the ratification.

Section 48 (6) of the Liquor Act is obviously designed to obviate delay in putting details of a complaint to a licensee. Mr. Preston's submission is not that there was any delay, quite the opposite. The licensee already had the details of the complaint at the time of its ratification, and a report from the Registrar as to the licensee's detailed reaction to the allegations was before the Commission when it determined to hold this hearing.

In summary,

- (1) The Registrar did not act wrongly or improperly in taking folio 1 of Exhibit 1 to be a complaint as to a breach of the Liquor Act;
- (2) The subsequent clarification and ratification of the complaint by the complainant did not necessitate a duplication of statutory process under section 48(6) of the Liquor Act which had already taken place;
- (3) The Commission's determination to hold the hearing was a proper consequence of the sequence of events, and we will not be exceeding our jurisdiction in now proceeding with the hearing.

It seems that Mr Stirk (Counsel assisting the Commission) and Mr Preston (Counsel for the licensee) and the members of the Commission are ad idem that the possible breaches arising from the allegations are breaches of Section 102 (serving an intoxicated person) and Section 121(1) (failure to remove an intoxicated person from the premises).

The complainant's case consisted of the evidence of three police officers, Senior Constable Westphal and Constables Phillips and McGuire, all deemed to be liquor inspectors by Section 19(10) of the Act, although Section 19(4) ensures they had greater powers on the night than if they had been inspectors who were not also police officers. They were that night at Scotty's Place on "liquor patrol", to use Constable McGuire's expression. They were in plain clothes, and had parked their vehicle at the southern end of the Mall.

It seems clear that the three police officers arrived at Scotty's Place at about 9.30pm. After some time went by a patron known now to have been Andrew Moseley (no relation to Superintendent Moseley) came to the officers' attention, and they each came to the conclusion that this patron was intoxicated, for reasons detailed in the evidence.

Senior Constable Westphal's evidence as to the intoxication of Mr Moseley was particularly strong. He found it hard to believe that the staff had not noticed what he was noticing, particularly the bumping into tables and people.

The officers then saw Mr Hodges, the Duty Manager, place his arms around Mr Moseley in a type of hugging movement, and say something to him close to his ear. They determined to keep watching this patron to see if he would be served a drink in his intoxicated condition.

At about 9.55pm (according to Westphal and Phillips), or about 5 minutes after the hugging observation (McGuire), all three officers saw Moseley skoll the last of the VB stubby he had been drinking and move (or "meander", to use the preferred expression

of the witnesses) to the bar, where he was given a fresh VB stubby by a barmaid with long straight dark or black hair, in exchange for coins from his pocket.

Constable Phillips was despatched to the police vehicle, parked some 100 metres down the Mall on Phillips' estimate, for a tape recording device, and at about 10pm they approached Mr Moseley and asked him out into the patio area for a recorded interview, which did not go well. Mr Moseley soon "burred up", to use one of the expressions in use during the hearing.

A security person by the name of Jim intervened, and was duly abused by Mr Moseley, whereupon Jim proceeded to drag the patron towards and through the front door, in company with Constable McGuire.

When Senior Constable Westphal exited the side area gate, he found Mr Moseley being restrained on the ground by Mr Hodges. Constable McGuire describes Mr Moseley at this stage as struggling violently, with Mr Hodges holding him to the ground.

Constable Phillips moved to the centre of the roadway which runs through the Mall in order to radio for a back-up police vehicle. He returned to the front of the tavern to assist in placing the struggling Mr Moseley into the caged vehicle which arrived in response to that call.

There followed interviews at the vehicle with Mr Hodges and Ms Anita Grimley, whom Mr Hodges had brought out in response to Senior Constable Westphal's request to go and bring out "the young lass behind the bar with long straight hair". Ms Grimley was asked if approximately 10 minutes ago she had served a drink to a gentleman wearing a yellow jacket, to which she replied "10 minutes ago, no". Ms Grimley was then shown Mr Moseley in the cage, she recognised him, and she was asked if she had served him "about 10 minutes ago", to which her answer was "No".

Such were the essentials of the complainant's case.

It has to be said that there are some unsatisfactory aspects of the police evidence. Given that they were specifically on a liquor patrol, which is presumably to say that the task at hand was to check licensed premises for breaches of legislation, and given that their sole purpose in continuing to observe Mr Moseley after having determined him to be intoxicated was the prospect of obtaining evidence of a sale or supply to him in that condition, there was a disappointing lack of corroboration of much of the detail of the subsequent critical transaction: Constable Phillips' view was obscured, and he could only say that he saw Mr Moseley leaving the bar with a fresh stubby, and Constable McGuire after initially testifying as to Mr Moseley "ordering" another beer then conceded he had neither heard nor seen any actual ordering taking place. Also he had only assumed that it was coins that Mr Moseley reached for in his trouser pocket.

No officer could remember if Mr Moseley had reached into his pocket with his left or right hand. This in itself may be thought a minor detail, but it indicates that none of the officers had a mental picture of the event as they were describing it in evidence.

There was no evidence as to the barmaid following up Mr Moseley's acquisition of the fresh stubby by activating the cash register.

There was no evidence as to what became of the fresh stubby. One would expect that the inspection, confirmatory identification, disposition and eventual fate of such a jewel in the centre of the evidence they had been waiting for would be carefully noted and documented. On the evidence, it quickly winks out of existence; when the officers approached Mr Moseley, admittedly some five minutes later, they are met with clenched fists, in the plural. They had watched him with his previous drink for the best part of 25 minutes, so what happened to the new one within a mere five minutes?

However, there is no doubt that the complainant presented a case to answer, and Mr Preston made no submission or application to the contrary.

The making out of a case to answer has different consequences for the licensee as regards the different sections of the Liquor Act which, on the case of the complainant, appear to have been breached. No reverse onus attaches to Section 121(1) (failure to exclude), as it does attach to Section 102 (serve intoxicated persons effectively becomes failure to serve only non-intoxicated persons).

We deal first with Section 121(1). The onus in this regard remains with the complainant, who needs to positively persuade us (along Briggenshaw -v- Briggenshaw lines), that a breach of that section has occurred. The task for the licensee therefore in making answer is to make such inroads into, or explanation of, the case of the complainant such that the Commission does not feel positively persuaded of the breach having occurred.

The licensee has succeeded in dissuading us that a breach of Section 121(1) occurred on the night in question, and without having in any way eroded the police evidence. The hugging incident between Mr Hodges and Mr Moseley described by the police officers has been explained by Mr Hodges as his way of telling Mr Moseley that he had had enough, that he would have to go when he finished his drink. This approach was taken in the light of Mr Hodge's knowledge of Mr Moseley's potential behavioural reaction to being cut off and his aim to achieve the exclusion of Mr Moseley without violence and risk to other patrons. It was explained that it can be an issue of loss of face for patrons in this situation, who (to use the colourful expression of Mr Sargeant) are more susceptible to "talk and walk" than "bite and fight".

The commencement of such exclusionary process was said by Mr Hodges to have been initiated by him in the normal course of his management, unaware of the presence of the officers on the premises, and Senior Constable Westphal had agreed that he believed that at that point the staff at Scotty's Place would not have been aware of the presence of the plain clothes team of officers.

We are unable to say that the exclusionary procedure should have been initiated earlier. A football match had been on the TV, and Mr Moseley's loudness and boisterousness

was attributed to his barracking rather than necessarily to intoxication. Mr Moseley's wearing of a jacket in the colours of the Richmond AFL Club is surely an indication of the likelihood of his demonstrable enjoyment of a broadcast match on a Friday night.

Mr Hodges eventually came to the conclusion that the time had come for Mr Moseley to go not long after the police officers came to a similar conclusion.

The method employed by Mr Hodges was not unreasonable and indeed may well have been quietly successful had the police intervention not triggered the very type of response on the part of Mr Moseley that Hodges had thought best to try and avoid.

In all the circumstances we are not persuaded of any breach of Section 121(1).

It is with Section 102 that the licensee has a problem that we do not believe, and do not accept, that it has overcome.

Once there is a case to answer in relation to a breach of Section 102, which is to say, once a sale or supply is demonstrated, together (we would add) with any reasonable ground to suspect that the recipient may have been other than not intoxicated, an onus of proof shifts to the licensee, who must prove that (in this case) Mr Moseley was not intoxicated, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred.

The nature of the reverse onus in section 102 in proceedings such as the present was raised in an earlier matter in April/May 1997, also involving Scotty's Place and Mr Preston, at which time the Commission had this to say on the issue of the reverse onus:

Mr Preston's second submission was that the reversal of the normal onus of proof now included in Section 102 since the amendment in 1996 is applicable only where the proceeding is such as can have a "defendant". That is, he says, the provision for reverse onus cannot apply to the present proceeding in that this proceeding is not a prosecution.

There is no definition of defendant in the Liquor Act. Nor could Mr Preston direct the Commission to any relevant definition or provision in any other Act in support of his submission. That being so, the Commission does not see the word “defendant” as being restricted to or signposting any particular jurisdiction or type of proceedings, but as referable to any “licensee or a person employed by a licensee” who contests an allegation of breach of Section 102 in any empowered forum.

If the licensee chooses to contest (that is, to defend) the allegation of a breach of Section 102 having occurred as alleged, then the burden of proof as to the non-intoxication of the person supplied with liquor lies on that licensee.

In arriving at this determination, the Commission concedes, however, that as a matter of law the reverse onus is able to be discharged on the balance of probabilities.

It is clear from that passage that we regarded the reverse onus as applying to the issue of non-intoxication of a person who has been supplied with liquor, i.e. in a situation where the sale or supply is a given, which of course requires service of liquor to have been admitted or proved, not merely alleged.

In this case there has been both a level of proof and a prima facie admission in relation to the service of liquor.

Mr Preston chose to attack the strength of the proof of service at the expense, in the Commission’s view, of failing to exclude, diminish or distinguish the admission we see as having been made by the licensee at folio 21 of Exhibit 1, to which we shall return.

Mr Preston was able to point to several inconsistencies or oddities in the police evidence which can fairly be said to raise questions as to their respective powers of observation of detail, and also to some inconsistencies between the evidence of Mr Hodges and Ms Grimley and of the police officers, (most notably the denial by Mr Hodges that he even touched Mr Moseley during or after the latter’s forcible ejection from the premises), all of which Mr Preston submits produces a “blurring” of the evidence necessarily in the licensee’s favour.

The critical essence of the police evidence was that after they saw Mr Hodges give Mr Moseley a hugging and a close-quarters talking-to, they saw Mr Moseley acquire a fresh beer in circumstances highly suggestive that he had been served it at the bar.

Mr Hodges agrees that at the time he hugged Mr Moseley he was of the view that Mr Moseley's intoxication was such that he should not be served any more. He instructed Jim to advise the bar staff accordingly, although fully expecting Mr Moseley to go quietly when he finished his drink as he said he would. Ms Grimley agrees that Jim passed this message on to her. She had not served Mr Moseley thereafter, the message from Jim having been "not long before" the disturbance of Mr Moseley's forced exit at the hands of Jim.

She agreed that she had served Mr Moseley at some stage earlier than when she was told he was cut off, and confirmed that she had told the truth in the taped interview, viz. that she had not served him in the last 10 minutes before the interview at 10pm.

There is an explanation consistent with all involved parties having told the truth as to the essential elements of their respective evidence, and that is the explanation given by the licensee at folio 21 of Exhibit 1, namely that after Mr Hodges determined that Mr Moseley had consumed "enough" alcohol to be told to finish up and leave, Mr Moseley was served another drink by a bar person before she received instructions as to the cut-off.

It is true that Exhibit 1, what is called the hearing brief, was received into evidence on condition that the documentation comprising the hearing brief would not be received as proof of the truth of the contents. At the time of the tender, Mr Preston needed several items of correspondence in the brief to be before us, not as evidence of the truth of matters raised in the correspondence, but as evidence of the existence of the correspondence, that certain letters had been written in certain terms.

Mr Preston submitted that the letter from the licensee to the “Department of Industries” which comprises folio 21 cannot be evidence of the truth of matters that the licensee said in the letter it had been told. It can only be evidence, says Mr Preston, of what the licensee said.

We do not disagree with that proposition, but what the licensee said in the letter was that Moseley *had* been inadvertently served after he had been cut off. This was the licensee’s response to an invitation from the Registrar to respond in writing to the allegations in the complaint, with a careful warning from the Registrar that if the licensee should choose to make such written response it would become part of the evidentiary material to be considered by the Commission.

Mr Preston submits that we may only take cognisance of evidence in the proceeding. That may not necessarily always be so, but in our view the letter of the licensee *is* evidence in this proceeding, evidence (as Mr Preston himself concurs) of what the licensee said about the substance of the complaint, fully aware that the letter was to become “evidentiary material”. If the licensee did not intend the admissions in the letter to now be taken at face value, or if it is to be said to be some sort of mistake, or whatever may be the reason why the licensee now wishes to avoid or devalue the effect of the apparent candour of the said letter, it was open to the licensee to call or to seek to call the author of the letter, Mr Reg Harris, the person Mr Preston has previously assured us was the “principal owner, director and shareholder” of the licensee company.

The licensee did not call Mr Harris for cross-examination on his statements in the letter, nor any other officer of the company either in relation to the letter or at all.

It is open to the Commission on all the evidence to accept that version of events as is described by Mr Harris in folio 21 of Exhibit 1, and we do so.

In that circumstance, in order to avoid a finding of breach of Section 102 of the Liquor Act, the licensee needed to prove that Mr Moseley was not intoxicated at the time of

the sale we have accepted as having taken place, a task Mr Preston flagged at the outset would not be attempted and which on the evidence was a sensible tactic.

We therefore find that on the night of 23rd April 1999 the licensee of Scotty's Place committed a breach of Section 102 of the Liquor Act.

Before hearing Counsel as to penalties or consequences, we can indicate that while we do not regard the breach as trivial, we are of the opinion that the breach is not of sufficient gravity in all the circumstances as to justify an actual suspension of licence. We take into account in mitigation, inter alia, that the process of having Mr Moseley finish up and go had already been initiated in the normal course of the licensee's management, and that some aspects of Mr Moseley's behavioural patterns were such as to make it difficult for a bar person to identify when certain aspects of his behaviour should be attributed to intoxication. This latter aspect alone may not have moved us very far in mitigation had the Duty Manager not already identified Moseley as a person who was to be excluded from the premises. While the subsequent service of another stubby to Moseley was not a trivial matter, in the circumstances it was obviously inadvertent and not as culpable as it would have been if able to be seen to be the result of any apparent managerial indifference or apathy.

(There then followed submissions by Counsel).

Following submissions by Counsel the Commission has determined pursuant to its powers under section 49(4)(a) of the Liquor Act to amend the conditions of the licence in relation to Scotty's Place by the insertion of an additional special condition in the following terms:

The licensee shall ensure that any patron who may be requested or required on behalf on the licensee to quit or vacate the licensed premises shall be continuously supervised by either the Duty Manager or a member of the licensee's security personnel from the time such request is made to the time the patron shall actually leave the premises. Such supervision shall entail the supervising person remaining in the immediate vicinity of

the patron who has been cut off from further service for so long as such patron shall then remain on the premises.

Pursuant to section 49(4)(c) of the Act, further consideration of this matter is deferred until such time as any further complaint of a similar nature which may be made or laid by any person within 12 months of today's date may be upheld or found proven, in which event the licensee shall be liable to be further dealt with pursuant to these present proceedings, either in isolation from or in conjunction with such subsequent proceedings.

If there should be no such complaint made or laid within the said period of 12 months, then at the end of that period these proceedings shall stand concluded, without anything further.

JOHN WITHNALL
(Presiding Member)
18 February 2000